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Wills: Confusion Surrounding the Determination of Heirs by Application of Sections 228 and 229 of the California Probate Code

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the decedent is "of no more moment than the contributory negligence of some third person."[29]

From an equitable view, the majority decision is the sounder of the two. Why should the defendant's liability depend upon the survival or death of the injured party? If he survived, his contributory negligence would bar a recovery, so why allow his death to defeat this defense? But as a logical matter, the dissenting opinion is more in line with the language used in section 377. This section gives the heirs a new cause of action that arises from the decedent's death, and they do not merely succeed to the right of action which the deceased had in his lifetime.[30] Can it be possible that the heir's rights are not derived from the decedent, but that his liabilities are nevertheless imputed to them?

—Jack Haddad.

WILLS: CONFUSION SURROUNDING THE DETERMINATION OF HEIRS BY APPLICATION OF SECTIONS 228 AND 229 OF THE CALIFORNIA PROBATE CODE.—It is the duty of the draftsman of a will to give full effect to his client's intent. To do this he must forecast the legal result of the will itself and it is therefore of paramount importance that the legal effect of a disposition to a class, such as "heirs," be certain. There is apparent confusion in the determination of heirs by the California courts in the application of sections 228 and 229 (of division 2) of the Probate Code. These sections read:

> § 228. Descent of Community Property in Absence of Spouse or Issue of Marriage.—If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was community property of the decedent and a previously deceased spouse, and belonged or went to the decedent by virtue of its community character on the death of such spouse, . . . such property goes in equal shares to the children of the deceased spouse and their descendants by right of representation, ...
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> § 229. Descent of Separate Property Inherited from Spouse on Death Without Spouse or Issue.—If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest, . . . such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation, ...

It is to be noted that these two sections differ only in that one deals with community property and the other with separate property. Therefore, whatever is to be said about the application of one will also apply to the application of the other. By virtue of these sections the blood relations of the predeceased spouse take not as heirs of the predeceased spouse but as heirs of the decedent.

Problems dealing with section 229 were recently pointed up in *In re Estate of Baird.*[1] William Baird established a testamentary trust in favor of his second wife, Margaret. When William died, he left Margaret, as well as children by his first wife, surviving him. The trust res consisted of what had been the separate property of William. Margaret had a beneficial life interest in the income of the trust, a testamentary power of appointment of the trust res, and was co-trustee with a bank.[2] William's will provided that in default of appointment, the trust res was to go to the heirs of Margaret.

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[29] See note 4 *supra* at 313.

[30] Marks v. Reissinger, 35 Cal.App. 44, 51, 169 Pac. 243, 246 (1917).

[1] 135 Cal.App.2d ——, 287 P.2d 365 (1955).

[2] The fact that Margaret was a co-trustee prevented any possibility of a merger of the legal and equitable interests in the trust.

Margaret died testate but without exercising her power of appointment as to a part of the trust res. Margaret left neither spouse nor issue surviving her, but she was survived by collateral heirs. William's children contended that they were the heirs of Margaret under section 229. Margaret's relations claimed that they were her heirs as determined by section 225.[3]

The court in the *Baird* case awarded the property in question to Margaret's heirs under section 225, holding that section 229 did not apply since Margaret's interest in the property came to an end on her death. The property did not become a part of Margaret's estate, but rather, passed under the default of appointment clause in William's will. William's will established remainder interests in Margaret's heirs subject to the exercise of the power of appointment by Margaret. Therefore, Margaret's heirs take directly from William.

It seems the court came to the correct result as it thereby gave effect to William's express intent that his own blood relations be cut off. Such intent was shown by his devise to the heirs of Margaret. While the court clarified the application of section 229 where the decedent had a mere life estate coupled with a power of appointment (which was not exercised), it is unfortunate that, by the use of ill-considered dicta, they created confusion in the application of section 229 in cases of testamentary disposition. The court seemed to feel that section 229 only applied to cases of intestacy. Referring to section 229, the court said:

> "The section is applicable if the property is that of a person (Margaret) *who dies without disposing of it by will.*"[4] (Emphasis added.)

The court more emphatically asserted this later in the opinion by saying:

> "Section 229 applies *only* in the event of intestacy of the surviving spouse."[5] (Emphasis added.)

The court in the *Baird* case was not the first to fall into the trap of declaring that section 229 applies only in cases of intestacy. In *In re Taitmeyer's Estate,*[6] the court said:

> "Sections 228 and 229 are applicable only when the acquisition of title to the property depends upon one dying without disposing of it by will."

It is not difficult to understand why the courts use such wordage since sections 228 and 229 are under division 2 of the Probate Code, which deals with the determination of heirs under the rules of succession. Succession is defined in section 200 as:

> . . . the acquisition of title to the property of one who dies without disposing of it by will.

According to this definition, succession applies only to intestacy. However, the *rules* of succession are applicable to testamentary bequests or devises to *heirs* by virtue of Probate Code section 108.[7] Section 108 reads:

> A testamentary disposition to "heirs," . . . of any person, without other words of qualification, and when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions of division 2 of this code. . . .

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[3] CALIF. PROBATE CODE § 225. If the decedent leaves neither issue nor spouse, the estate goes to his parents in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to his brothers and sisters and to the descendants of the deceased brothers and sisters by right of representation.

[4] See note 1 *supra* at ——, 287 P.2d at 369.

[5] See note 1 *supra* at ——, 287 P.2d at 372.

[6] 60 Cal.App.2d 699, 710, 141 P.2d 504, 511 (1943).

[7] Dickey v. Walrond, 200 Cal. 335, 339, 253 Pac. 706, 708 (1927).

A testamentary disposition to heirs will therefore be determined by the rules of sections 228 and 229 if the requisites of these sections are otherwise present. The primary requisites of sections 228 and 229 are:

1. That the decedent leave neither spouse nor issue surviving.

2. That the property involved was the separate or community property of a predeceased spouse.

An example of how section 229 will be applied in a case of testamentary devise when implemented by section 108 follows: W died testate leaving neither spouse nor issue. The property in W's estate was the separate property of a predeceased husband who died with children of a previous marriage surviving him. This property was left to W by devise. In W's will she left all of her estate to "my heirs." The determination of who is to take under the devise to "heirs" is governed by section 108. Since section 108 refers to division 2, a search of that division shows that the lack of surviving spouse or issue would involve either section 225, 228, or 229 to determine who would take. It is the previous nature of the property, *i.e.*, separate property from a predeceased spouse, that pinpoints section 229 as the applicable section. Under these facts the children of the predeceased husband by his previous marriage would qualify as W's sole heirs. W's blood relations are cut off and persons who are of no blood relation to her take as her heirs.

The Supreme Court of California in *In re Page's Estate*[8] applied section 229 where there was a testamentary devise to "my lawful heirs." The facts in the *Page* case were essentially the same as in the above hypothetical case. The court awarded the property involved to the blood relations of a predeceased spouse as the heirs of the deceased.

It is well for the draftsman to beware the pitfall made by the application of section 108 with sections 228 and 229. The negative implication of the dicta referred to in the *Baird* case and the *Taitmeyer* case is clearly that a testamentary devise will prevent application of sections 228 and 229. The draftsman who relies upon this is in danger of contravening his client's intent if there is property involved which fulfills the requisites of the sections. The easiest way to avoid the result of the *Page* case would be to avoid the use of the terms "heirs," "next of kin," and similar terms as words of donation by making specific bequests to named persons. Since this is not always possible, nor is it desirable in many cases, care should be taken to qualify the term "heirs" and the like in such a manner that section 108 would not apply.[9]

It is the normal expectation of one who leaves property to his heirs by devise that such property should go to his own blood relations. It is therefore submitted that the best way to prevent the possible frustration of testator's intent would be to amend section 108. Such an amendment would prevent application of sections 228 and 229 in the determination of heirs where there is a testamentary devise to heirs.[10] In this way these sections would have no application unless it is the express intent of the testator that they apply or unless it is the necessary implication of the will that they should apply.

—*Edward M. Wright.*

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[8] 181 Cal. 537, 185 Pac. 383 (1919). See also Estate of Wilson, 65 Cal.App. 680, 225 Pac. 283 (1924); Estate of Watts, 179 Cal. 20, 175 Pac. 415 (1918).

[9] See Estate of Marshall, 176 Cal. 784, 169 Pac. 672 (1918), where a disposition "to my own family, who I think are in Mexico" was held qualification enough to prevent application of section 108.

[10] This was suggested in an article by W. W. Ferrier, Jr., *Gifts to Heirs in California*, 26 CALIF. L. REV. 413, 436 (1938).